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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Fourth Circuit, that on the facts alleged there was no joint participation or engagement by private litigants with state officials amounting to action under color of state law is a decision on a federal question which conflicts with the applicable decisions of this Court.

2. Whether the decision of the United States Court of Appeals for the Fourth Circuit, that on the facts alleged there was no joint engagement by private litigants with state officials amounting to action under color of state law conflicts with the decisions of other Courts of Appeal.

3. Whether the decision of the United States Court of Appeals for the Fourth Circuit that joint engagement or participation by private litigants, with state officials,

amounting to action under color of state law, requires official corruption or surrender of authority raises an important question of federal law which should be decided by this court.

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia is unreported and unpublished. It appears as Appendix A to the Petition for Certiorari at pp 32-41.

The opinion of the United States Court of Appeals for the Fourth Circuit is published but as yet unreported. It appears as Appendix B to the Petition for Certiorari at pp 42-129.

JURISDICTION

The Order of Judgment of the Court of Appeals was entered on January 9, 1981. (See Petition for Certiorari, Appendix B, p. 42.) The Petition for Certiorari was filed less than ninety (90) days from the aforesaid, as required by 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Amendment XIV to the UNITED STATES CONSTITUTION provides in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Amendment V to the UNITED STATES CONSTITUTION provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 1331 (a) provides in pertinent part:

> The district courts shall have jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1343 provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States . . .;

(2) :

(3) To redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States . . . ;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person, within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

> to the party injured in an action at law, suit in equity, or other proper proceeding for relief.

Va. Code Ann. §8-519 (Now §8.01-533)(Code of Va. Vol. 2, 1957 Repl. Vol. p. 375) states in pertinent part:

> If any person have a claim, legal or equitable, to any specific personal property, or a like claim to any debt, whether such debt be due and payable or not, or to damages for breach of any contract, express or implied, or to damages for a wrong, and such claim exceed twenty dollars, exclusive of interest, he may sue out an attachment therefore on any one or more of the grounds stated in the following section . . . .

Va. Code Ann. §8-520 (Now §8.01-534)(Code of Va. Vol 2, 1957 Repl. Vol. pp 376-377) provides in pertinent part:

> It shall be sufficient grounds for an attachment that the principal defendant or one of the principal defendants:
>
> :
>
> (4) Is converting, is about to convert or has converted his property of whatever kind, or some part thereof, into money, securities or evidences of debt with intent to hinder, delay or defraud his creditors.
>
> (5) Has assigned or disposed of or is about to assign or dispose of his estate, or some part thereof, with intent to hinder, delay or defraud his creditors.
>
> :

Va. Code. Ann. §8-524 (Now §8.01-537)(Code of Va. 1976 Cum. Supp.) Vol. 2, 1957 Repl. Vol. p. 38 provides in pertinent part:

> Every attachment, except an attachment for rent, shall be commenced by a petition

filed in the clerk's office, whether the court be in session or not, or before a district court judge or clerk of a district court of the county or city in which venue is given by §8-522.

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If it is sought to recover a debt or damages for a breach of contract, express or implied, or damages for a wrong, the petition shall set forth the plaintiff's claim with such certainty as will give the adverse party reasonable notice of the particulars thereof, and shall state a sum certain which, at the least the plaintiff is entitled to, or ought to recover, and if the claim be for a debt not then due and payable, at what time or times the same will become due and payable. The certainty required of a motion for judgment under Rule of Court 3:18(d) shall be sufficient. The petition shall also set forth the

> existence of one or more of the grounds of attachment mentioned in §8-520, and shall ask for an attachment against the specific personal property mentioned in the petition, or against the estate, real and personal, of one or more of the principal defendants, or against both the specific personal property and the estate of both defendants, real or personal. The petition shall be sworn to by the plaintiff or his agent, or some person cognizant of the facts stated therein.

Va. Code Ann. §8-526 (Now §8.01-540) (Code of Va., Vol 2, 1957 Repl. Vol. p. 382) States in pertinent part:

> Upon the filing of the petition mentioned in §8-524, the clerk or the justice of the peace before whom the petition is filed shall issue an attachment in accordance with the prayer of the petition, subject to the provisions of §8-524.1. . . . If the petitioner

> seeks to recover a debt or damages for the breach of a contract, express or implied, or damages for a wrong, the attachment shall be against the principal defendant's estate for the amount specified in the petition as that which the plaintiff at the least is entitled to or ought to recover.

Va. Code Ann. §8-527 (Now §8.01-541) (Code of Va. Vol. 2, 1957 Repl. Vol. p. 382) states in pertinent part:

> Any attachment issued under this chapter may be directed to the sheriff, sergeant or constable of any county or city. Except when otherwise provided, it shall be returnable to a day of a term of the court not more than thirty days from its date of issurance nor less than 10 days from the date of service . . . .

Va. Code Ann. §8-533 (Now §8.01-546)(Code of Va., Vol. 2, 1957 Repl. Vol. p. 384), provides in pertinent part:

> . . . Every other attachment shall command the sheriff or other officer to whom it may be directed to attach the property mentioned and sought to be attached in the petition, if any, and so much of the lands, tenements, goods, chattels, moneys and effects of the principal defendant not exempt from execution as will be sufficient to satisfy the plaintiff's demand . . . .
>
> Every attachment sued out under this section shall also command the sheriff or other officer to summon the defendant or defendants, if he or they be found within his county or city, or any county or city wherein he may have seized property under and by virtue of such writ, to appear and answer the petition for attachment, or state his grounds of defense thereto.

Va. Code Ann. §8-539 (Now §8.01-552)(Code of Va. Vol. 2, 1957 Repl. Vol. p. 389) provides in pertinent part:

If the principal defendant shall file in the clerk's office of the court to which the attachment is returnable an affidavit of himself, his agent or attorney, that he has a substantial defense to the merits of the plaintiff's claim, it shall be the duty of the clerk forthwith to notify the plaintiff, his agent or attorney, of that fact, and the attachment shall stand dismissed ipso facto unless within ten days from the service of such notice the plaintiff or someone for him, shall enter into bond with security approved by such clerk, in a penalty of at least double the amount of the claim sworn to or sued for, with condition that the plaintiff will prosecute his attachment with diligence, and that the obligors will pay all costs and damages which may be awarded against the plaintiff, or sustained by such defendant, or any other person, by reason of suing out the attachment.

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Va. Code Ann. §8-540 (Now §8.01-553)(Code of Va. Vol. 2, 1957, Repl. Vol. p. 389) provides in pertinent part:

> Any property levied on or seized as aforesaid, under any attachment, may be retained by or returned to the defendant or other person in whose possession it was on his giving bond, with condition to have the same forthcoming at such time and place as the court may require; or the principal defendant may, by giving bond with condition to perform the judgment of the court, release from any attachment the whole of any estate attached.

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Va. Code Ann. §8.01-114 provides in pertinent part.

> A. . . .
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> B. The judge or magistrate aforesaid may issue such an order or other process ex parte upon the application of plaintiff, if there shall appear from his evidence, or that of his witnesses: (i) the kind, quantity and value of the property as to which plaintiff seeks possession, (ii)(a) that such property will be sold, removed, secreted or otherwise disposed of by the defendant, in violation of an obligation to plaintiff, so as to not be forthcoming to answer the final judgment of the Court respecting the same, or

(b) that such property will be destroyed or materially damaged or injured if permitted to remain longer in possession of such defendant or person claiming under him; and (iii) that plaintiff's claim of entitlement to recover said property as a substantial basis.

C. . . .

REVISERS' NOTE

This section, former §8-586, and others in this article were amended in 1974 to make the procedure comply with the requirements set out in Fuentes v. Shevin, 407 U.S. 67 (1972) and Sniadach v. Family Finance Corporation, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969). These two cases were further discussed in Mitchell v. W. T. Grant, 416 U.S. 600 (1974) in which the Supreme Court restricted the scope of the two former cases. In general, no substantive changes have been made to former §8-586 ff.

Va. Code Ann. §8.01-119 provides in pertinent part:

A. Within twenty one days after the issuance of any ex parte order or process pursuant to §8.01-113, or promptly upon application of either party, in either event after reasonable notice, the court in which such action or warrant is pending shall conduct a hearing to review the decision to issue the order or other process described in §8.01-114, ...

B. . . .

C. . . .

Va. Code Ann. §8-556. Quashing attachment of rendering judgment for defendant.

> The court in which an attachment is pending, or the judge of such court in vacation may, either before or at any time after an attachment has been returned, on motion of the principal defendant, or any defendant claiming title to, an interest in, or a lien upon the property attached, or any part thereof, after reasonable notice to the attaching creditor, hear testimony and quash the attachment, if of opinion that the attachment is invalid on its face, or was issued on false suggestion, or without sufficient cause. When the attachment is properly sued out, and the case is heard upon its merits, if the court be of opinion that the claim of the plaintiff is not established, final judgment shall be given for the defendant. In either case, he shall recover his costs, and there shall be an order for the restoration of the attached effects.

STATEMENT OF THE CASE

There was no evidence taken in this case. The facts will be stated, taking the allegations of the Complaint as true.

On April 1, 1977, Giles Lugar, hereafter Lugar or debtor, was lessee operator of a truck stop located in Pittsylvania County, Commonwealth of Virginia (J.A. 41-43).

On March 31, 1977, Ronald Barbour, hereafter Barbour, executed a Petition for Attachment directed to the Clerk of the Circuit Court of Pittsylvania County. (J.A. 22, 26). This petition was filed under the provisions of Va. Code Ann. §8-519[1] on behalf of the defendant creditor

1. Title 8 of the Code of Virginia was revised, recodified and reenacted as Title 8.01 effective October 1, 1978. The Revisers notes indicated changes in some of the statutory language. The effect and substantive provisions of the statute remain substantially unchanged. However, all references will be to the statutory sections in effect at the time of the attachment.

Edmondson Oil Co. At the time Barbour was president of Edmondson (J.A. 26).

The petition alleged in part that a debt was due Edmondson and that Lugar was converting, assigning or disposing of his assets with intent to hinder or delay his creditors. (J.A. 22-26). No fraud or intent to defraud was alleged.

This petition was filed with the Clerk as required by Va. Code Ann. §8-524. The clerk as commanded by Va. Code Ann. §8-526 issued a writ of attachment directed to the Sheriff of Pittsylvania County, Virginia. (J.A. 27-30). The sheriff levied upon Lugar's assets as required by law, Va. Code Ann. §8-533, freezing the assets and closing his business (J. A. 35-37).

Lugar then filed an affidavit of substantial defense, Va. Code Ann. §8-539; in response to which the creditor posted the statutorily required bond.

The first hearing on the attachment

petition on April 19, 1977, and at the creditor's request, a rehearing was held on May 1, 1977. On May 4, 1977, a decision which found "no evidence sufficient to establish the grounds of attachment" was handed down and the levy was dissolved. (J.A. 38-40).

Prior to the levy, there was no hearing or intervention by a judicial officer, no notice to Lugar, no bond posted and no statement of more facts than conclusory allegations which recited the words of the statute. (J.A. 4-5, 9-10, 23-27).

After various proceedings in state court, Lugar filed this action in the United State District Court for the Western District of Virginia. The complaint alleged that a cause of action existed under 42 U.S.C. §1983. (J.A. 2, 6-7, 8, 16-17) Lugar alleged as facts supporting his complaint that Edmondson's and Barbour's acts were malicious; (J.A. 17), that Edmondson and Barbour were joint participants with the

state acting under color of state law; (J.A. 6, 16), that Edmondson and Barbour, acting with the state, had deprived him of his property without due process of law and that he had been injured thereby. (J.A. 6-7, 16-17). Lugar also alleged that the attachment entered without a hearing or judicial intervention (J.A. 4, 10) and by implication alleged that the clerk acted in a ministerial capacity (J.A. 2-3, 5, 8-9, 11).

The defendants filed a motion to dismiss alleging that the Court should abstain (J.A. 47). The District Court, acting sua sponte dismissed the complaint on the authority of Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978). (Petition for Certiorari, Appendix A, pp. 32-41) The District Court found that there was no state action analyzing the attachment to the enforcement of a consensual lien.

Lugar sought to amend the judgment

and reinstate the action (J.A. 50-51). This motion was dismissed as untimely (J.A. 53-54). Lugar then appealed.

The case was heard by a three judge panel of the United States Court of Appeals for the Fourth Circuit in November, 1979. The Court of Appeals acting sua sponte set the matter for rehearing en banc on January 7,1980.

The Court of Appeals rendered its decision on January 9, 1981 (J.A. 55-56). It affirmed the District Court's judgment of dismissal but not on the grounds cited by the District Court. Instead, the Court of Appeals, after a lengthy analysis concluded that since there was no allegations or evidence of "usurpation or corruption of official power" or "surrender of power so that the independence of the enforcing official has been compromised to a significant degree and the official powers have become in practical effect shared by the

two," that no cause of action was stated. (Petition for Certiorari, Appendix B, at 103-104). The Court characterized the attachment process as submission by a litigant of "his interests along with those of his adversary to the neutral administration of the [state's] powers by state official having that responsibility." (Petition for Certiorari, Appendix B, at 106).

Lugar then filed his Petition for a Writ of Certiorari on April 6, 1981, and Certiorari was granted on June 15, 1981.

SUMMARY OF ARGUMENT

I

A

This Court has decided several cases involving prejudgment attachments and in all but one has granted relief. Two of the prior cases involved claims under 42 U.S.C. §1983 as does the case at bar. All cases involved private parties and some did not involve public officials as defendants.

No question has ever been raised that a prejudgment seizure does not involve sufficient state action to make a claim under 42 U.S.C. §1983. The Virginia statute fails to conform to the standards established by this Court. It's application involves joint action within the preview of 42 U.S.C. since the state does for the creditor what it cannot do itself. The decision of the Court of Appeals conflicts, as a result with this Court's decisions.

B

This Court has previously found that a statute of a type similar to the Virginia statute abdicates effective state control of its power and authority. This meets the standard established by the Court of Appeals. Its failure to recognize this and reverse the decision of the District Court conflicts with the decisions of this Court.

C

This Court has recognized state involvement with private individuals sufficient to amount to a cause of action under 42 U.S.C. §1983 where the state and private parties act together in joint enterprise, the individuals are carrying out state law or custom; or the state has placed its power and prestige behind the individual actions.

While corruption and conspiracy may amount to such joint involvement, it has never been held to be necessary.

II

Other Courts of Appeal have found a cause of action in cases seeking a remedy for prejudgment seizures. As noted in the dissent, this has been the case even where judgment was ultimately rendered for the creditor.

State involvement substantially less overt has been found to give rise to a cause of action in real estate foreclosures. The decision of the Court of Appeals for the Fourth Circuit conflicts with these decisions.

III

This court has allowed relief in cases of prejudgment seizures as have several Courts of Appeal.

The decision by the U. S. Court of Appeals for the Fourth Circuit would establish a threshold requirement that corruption or surrender of control be shown. This requirement is not limited to prejudgment

seizure cases and would severely limit access to federal courts. This is a point of law which should be passed on by this court.

ARGUMENT
I

The decision of the Court of Appeals conflicts with the applicable decisions of this Court in that it finds no cause of action in situations where this Court has recognized such a cause of action. It further ignores the finding of this Court that an abdication of state power exists under a similar statute.

The standard which the Court of Appeals sets out has no support in the applicable decisions of this Court.

A.

The United States Court of Appeals for the Fourth Circuit has found that, in order for there to be a cause of action under 42 U.S.C. §1983, there must exist, or be alleged, that the private defendant has usurped or corrupted state officials in the exercise of their power. Alternatively, the state or state officials must so surrender control of his power as to compromise his independence of action (Petition for Certiorari, Appendix

B, 103-104). Absent such a set of circumstances, the Court of Appeals characterizes the prejudgment attachment as merely "invok-[ing] the states judicial process...[and submitting] his interests along with those of his adversary to the neutral administration of state officials" (Petition for Certiorari, Appendix B, 106).

Having established this standard, the Court of Appeals found that neither corruption or surrender of power existed and dismissed the action for failing to state a claim under 42 U.S.C. §1983.

With due respect to the Court of Appeals, this is error and conflicts with the applicable decisions of this Court and other Courts of Appeal in several ways.

This Court in Fuentes v. Shevin, 407 U.S. 67(1972) and earlier in Lynch v. Household Finance Corp., 405 U.S. 538(1972) was presented with cases involving a claim under 42 U.S.C. §1983 against private parties as well as state

officials. There is no suggestion whatever, in either case, that for the private parties to be amenable to suit under 42 U.S.C. §1983, that corruption or surrender must be shown on the part of state officials.

Lynch, supra, in particular dealt with the court's jurisdiction under 28 U.S.C. §1343(3) which copies the language of a portion of 42 U.S.C. §1983. This Court specifically noted the involvement of the private parties, Lynch, supra at 539. It found jurisdiction and remanded for trial on the merits. The fact that state officials were parties in Lynch would not appear to be significant in considering the present case. The Court of Appeals found that state officials are not indispensible parties. (Petition for Certiorari, Appendix B, pp 88-89 and fn. 16, pp 84-85).

This Court again considered a case involving a challenged prejudgment seizure in Mitchell v. W. T. Grant, Co., 416 U.S. 600

(1974). The jurisdiction in that case would have been grounded on 28 U.S.C. §1257(3). Although the challenged statute was found to be valid, no mention or question was raised that a cause of action against a private party might not exist. No public officials were involved.

Again in North Georgia Finishing Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) this Court considered a petition brought under 28 U.S.C. §1257(3). A Georgia statute allowing for prejudgment seizures was challenged. No public officials were involved. The seizure was characterized by the Georgia Supreme Court as amounting to a lis pendens.

This Court struck down the Georgia statute without once questioning that a private party could not challenge a deprivation of constitutional right by another private party in such circumstances.

In Mitchell, supra, and Di-Chem, supra,

the requirements for some sort of due process protection of a debtor were revised and refined. Mitchell, supra, struck down the Georgia statute since the order for the seizure was issued by a clerk "without notice and opportunity for an early hearing and without participation by a judicial officer, Di-Chem, supra, at 606.

The Georgia statutes attacked bear a strong resemblence to the Virginia statutes challenged.

The defendant-creditor would characterize the Virginia statute as providing an opportunity for an early hearing, Va. Code Ann. §8.01-568 formerly Va. Code Ann.§8-556, and fitting the Mitchell standards "like a glove." (Brief in Opposition to Petition for Certiorari, pp 11-12). This argument is erroneous in three respects.

First, it deliberately ignores the lack of judicial involvement so characteristic of Di-Chem, supra; Fuentes, supra; and related

cases.

Second, it does not take account of the provisions of Va. Code Ann. §8.01-541 formerly Va. Code Ann. §8-527 which establishes a return date for the petition to the clerk. The hearing in this case was held one day after the return date noted on the Writ (Appendix 33). It further fails to take account of the fact that Va. Code Ann. §8.01-568 only provides that a hearing may be held on motion. Comparison to the Virginia statutes on detinue is instructive. The Revisers note indicates that this statute was amended to meet the Mitchell standards. In addition to providing judicial supervision, Va. Code Ann. §8.01-114(B), it also provides that a prompt hearing shall be held on application of either party Va. Code Ann. §8.01-119(A).

The final failure of the creditors' argument is that it fails, as did the Court of Appeals, to take account of the relationship of the parties. In Sniadach v. Family

Finance Corp. 395 U.S. 337 (1969) this Court found it significant that the creditor had no prior interest in the debtors wages.

In Mitchell, supra, this Court found it noteworthy that the debtor did not have an exclusive and clear title to the property. 416 U.S. at 604.

In the present case it cannot be denied that the attaching creditor had no claim or right, legal or equitable, statutory or contractual in the debtors property, save only a security interest in accounts receivable. Had the creditor personally seized the property to preserve the "status quo" immediate criminal remedies for burglary and grand larceny would have been available to the debtor. It was only the intervention of state power and prestige, invoked by the creditor for its sole benefit, without question or control, which accomplished for the creditor what it could not otherwise do for itself. The creditor, effectively,

through the state, seized the debtors' property. The state does not act in such cases without the creditor requesting it to do so. It furthermore does not act to vindicate any compelling state interest in public health, safety, or welfare. While the state may have an interest in assisting creditors in collecting their debts, this interest does not override constitutional requirements applicable to all parties. To argue otherwise, in effect, prejudges the case by assuming that all debts are valid, all debtors are defaulters and all creditors always act in good faith.

This Court has refused to make that assumption. It has recognized causes of action and available remedies when a creditor and the state act together as they have here.

B.

The decision of the Court of Appeals

states as a borderline requirement for the existence of a course of action that there be corruption or surrender of power. It then finds that in the case at bar, no such circumstances exist.

Lugar alleged that the Attachment was issued by the Clerk without intervention by a judicial officer and the statutory sections involved (J.A. 3-5, 8-10). Taking these allegations as true as he is entitled to do, the Complaint alleges a ministerial act without judicial intervention.

Assuming that the requirements laid down by the Court of Appeals are valid, and this is not conceded, its decision is in direct conflict with the decisions of this Court. This Court, in Fuentes, supra, described a similar statute as an "[abdication] of effective state control over state power." 407 U.S. at 93. This description is supported by the analysis in Di-Chem, supra. This is sufficient to meet

the standards imposed by the Court of Appeals.

C.

The Court of Appeals out of several prior cases of this Court has woven a requirement of corruption or abdication of control. As previously discussed, this conflicts with the decisions of this Court in cases involving similar sets of circumstances. The analysis also is not supported by the cases cited and conflicts with them.

This Court has long held that individuals jointly engaged in a joint enterprise with state officials are liable under 42 U.S.C. §1983. Thus conspiracy or action to consummate an unlawful purpose is state action on the part of private parties. Sparks v. Dennis, ___ U.S.___ , 66 L.Ed 2d 185(1980); United States v. Price, 383 U.S. 787 (1966). Action by private individuals to enforce an unconstitutional state law is actionable Peterson v. City of

Greenville, 373 U.S. 244(1963). Likewise, action under an otherwise valid state law in enforcement of an unconstitutional state custom is state action. Adickes v. S. H. Kress & Company, 398 U.S. 144(1970). Notably, while these cases involve concerted actions by private and public parties, they make no suggestion that only corruption or abdication are sufficient to constitute a cause of action.

The common thread running throughout is that where private parties act jointly with the state, to achieve a result commanded by state law and determined thereby that action under color of state law exists. To this basic premise is added here that the action by state officials is solely at the behest of the creditor, without control, judicial or otherwise, for the creditors sole benefit and that it is not in furtherance of any compelling state interest Fuentes, supra at 90-92.

The circumstances require the analysis of Burton v. Wilmington Parking Authority, 365 U.S. 715(1961). That analysis is that the placing of state power and prestige behind a private party raises a cause of action. 365 U.S. at 725.

This is what has occurred here. The complaint is not that the creditor was on the winning side of a law suit. Seizure of property for the sole benefit of one party prior to a claim being adjudicated hardly qualifies as "neutral administration" or being on the winning side of a law suit. It is, however, the result of joint actions and the placing of state power and prestige at the behest of one party. Accordingly, a cause of action exists under the decisions of this court.

II

The decision of the Court of Appeals conflicts with the decisions of other Courts of Appeals involving similar circumstances and parties. No other Court of Appeals considering this issue appears to have adopted this reasoning.

The decision of the Court of Appeals for the Fourth Circuit conflicts with the decisions of other Courts of Appeals. These Courts have allowed relief on causes of action involving private plaintiffs where the wrong alleged involved prejudgment attachments or garnishments. Johnson v. American Credit Co. of Georgia, 581 F2d 526 (5th Cir. 1978), Guzman v. Western State Bank of Devils Lake, North Dakota, 516 F2d 125 (8th Cir. 1975); Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973).

Additionally, as pointed out by Judge Butzner in his dissenting opinion, (Petition for Certiorari, pp 110-123), there is a

conflict with other Courts of Appeal which have found a cause of action even though judgment was ultimately rendered for the creditor. (See Petition for Certiorari, p. 122 for cases cited.)

There is also the case of Jonnett v. Dollar Savings Bank of the City of New York, 530 F2d 1123 (3rd Cir. 1976) wherein the Court found prejudgment attachment statutes unconstitutional. Although the jurisdictional basis was provided by diversity the Court implied that it would find a cause of action based on the federal question. Neither Johnson, supra; Guzman, supra; Western Coach Corp., supra; nor Jonnett, supra, even hint at a requirement of consipracy or abdication of power in order to establish a cause of action.

The holding below would also conflict with the analysis and finding of juris-

diction in Diffenbach v. Attorney General of Vermont 604 F.2d 187, 192-195 (2d Cir. 1979). Although that case involved a public defendant, the Court of Appeals for the Second Circuit found state involvement in the action of private parties. This was based on the involvement of the state judicial system in the foreclosure process of Vermont. The involvement there of the state is substantially less than in this case where the state acts extrajudicially to benefit one party to a dispute.

None of these cases and none of the cases cited in the dissent use or even suggest the analysis adopted by the Court of Appeals for the Fourth Circuit. All have followed this Court in finding that a remedy exists which presupposes a cause of action.

III

The decision of the Court of Appeals establishes a principle of federal law which would severely limit relief under 42 U.S.C. §1983 and access to federal courts.

This case, as decided by the Court of Appeals for the Fourth Circuit, raises an important issue of federal law which should be decided by this Court.

This Court has recognized a cause of action for prejudgment seizures in Lynch, supra; Sniadach, supra; Fuentes, supra; Mitchell, supra and Di-Chem, supra. Several of these cases have involved claims under 42 U.S.C. §1983. Other Courts of Appeal have recognized causes of action on similar circumstances; Johnson, supra; Guzman, supra; Western Coach Corp., supra; cf. Jonnett, supra.

The standard for determining whether or not a cause of action exists has been the involvement of the state with the private party. Thus, where the state has

placed its power and prestige behind the private party, as in Burton, supra, a cause of action exists. Where the state and private parties act jointly together, a cause of action exists; Dennis v. Sparks, supra; United States v. Price, supra. Likewise, there is joint action where the state commands a result and the parties act together to achieve it. Adickes v. Kress, 398 U.S. 144(1970).

While Sparks, supra, and Dennis, supra, involve joint acts in violation of law, Adickes, supra involves action by a private person under an otherwise valid state law for an improper purpose. Burton did not involve overtly joint action while Lynch, Sniadach, Fuentes and Di-Chem did.

The Court of Appeals, from such cases as Adickes, supra, and Sparks, supra, has derived a standard which it applies to prejudgment seizure cases. This standard of corruption or surrender of control would,

applied on its face, have required the dismissal on the pleadings of most, if not all of these cases or, at the very least of the private parties.

The new standard does not apply only to these cases. It is across the board and would effectively cripple the remedial aspects of 42 U.S.C. §1983 as applied to private parties. Unless corruption or abdication is alleged; and, presumably proven by the plaintiff, the private party is immune. It would appear that effectively the Court of Appeals has evoked a standard under which not only is access to federal courts severely limited but which effectively would imply that many prior cases of this court were wrongly entertained.

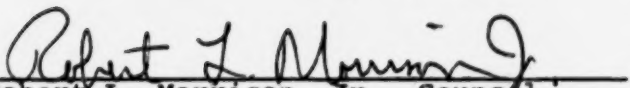
Such a limitation of court access and new principle of federal law should be ruled on by this Court.

CONCLUSION

The petitioner, Giles M. Lugar, for the reasons above stated, moves that this Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit. Lugar further moves that this Court disapprove the threshold requirements established by the lower Court and that this case be remanded to the United States District Court for the Western Districk of Virginia for trial on the merits.

Respectfully submitted,

Giles M. Lugar
By Counsel



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C E R T I F I C A T E
O F S E R V I C E

Pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I the undersigned do hereby certify that:

1. I am a member of the Bar of this Court, in good standing and represent the petitioner herein.

2. Pursuant to Rule 28.3, I have caused three copies of the Petitioner's Brief to be served upon Jackson Kiser, Young, Kiser, Haskins, Mann, Gregory, & Young, Ltd., 60 West Church Street, Martinsville, Virginia, 24112 and to H. Victor Millner, Main Street, Chatham, Virginia, 24531.

3. Pursuant to Rule 28.4, I have caused a copy of the Petition for a Writ of Certiorari to be served ypon the Attorney General of Virginia and, at his request, have caused three copies of the Petitioner's Brief on the Merits to be

served upon the Attorney General of Virginia and that no question has been certified by any Court of the United States to the Attorney General of Virginia on the question of constitutionality of the state statute, this 29th day of July, 1981.

Robert L. Morrison Jr.

AFFIDAVIT OF SERVICE

In accordance with Rules of the Supreme Court of the United States, I hereby certify that I have this 29th day of July, 1981 mailed the required copies of the Petitioner's Brief on the Merits and Joint Appendix to the Clerk's Office of the Supreme Court of the United States.

BY: Barbara E. Grove

Lawyers Printing Co.
P. O. Box 1654
Richmond, Virginia 23219

July 29, 1981

Sworn to before me this 29th day of July, 1981.

Cynthia Q. Gray
NOTARY PUBLIC FOR VIRGINIA

My Commission Expires: 8/10/84